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No. 89-1075

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.A. POULTRY FARMS, INC., *et al.*,
Petitioners,

v.

ROSE ACRE FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

ROBERT KIRK STANLEY *
STEPHEN H. PAUL
JOHN R. SCHAIBLEY, III
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300
Counsel for Respondent

* Counsel of Record

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. (a) Whether Petitioners' Questions 1(a)-(c) are based on a mischaracterization of the Court of Appeals' opinion?

(b) Whether Petitioners' Questions 1(a)-(c) are based on factual assertions that are not supported by the evidence in this case? In particular: (i) whether there is sufficient evidence to support Petitioners' contention that the egg market is an "oligopoly"; (ii) whether there is sufficient evidence to support a finding of predatory intent, notwithstanding findings by both the Court of Appeals and the District Court that Petitioners failed to present any probative evidence of predatory intent; and (iii) whether there is sufficient evidence to support a finding that Respondent's prices were below any relevant measure of cost, notwithstanding the District Court's undisturbed finding that Petitioners failed to present sufficient evidence of below-cost pricing?

(c) Whether, in any event, Petitioners' Questions 1(a)-(c) present any issue meriting review by this Court?

2. Whether certiorari should be granted to review a fact-specific alternative holding of the District Court, relating to the "perishable goods" exemption in the Robinson-Patman Act, that was not addressed by the Court of Appeals and was not the basis for the Court of Appeals' judgment?

3. Whether Petitioners presented sufficient evidence to sustain their burden of proving price discrimination in violation of the Robinson-Patman Act?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Respondent Rose Acre Farms, Inc., was defendant-appellee below. Respondent does not have any parent or non-wholly-owned subsidiary company required to be listed separately pursuant to Rule 29.1. The Petitioners, plaintiffs-appellants below, are listed on page ii of the Petition for a Writ of Certiorari, along with the information regarding Petitioners' parent and subsidiary companies.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent, Rose Acre Farms, Inc. ("Rose Acre"), submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners A.A. Poultry Farms, Inc., et al. The Petition seeks review of a unanimous decision by the United States Court of Appeals for the Seventh Circuit (Petition App. A) affirming a judgment entered by the United States District Court for the Southern District of Indiana (Petition App. B). For the reasons explained below, Rose Acre urges the Court to deny the Petition.

STATEMENT OF THE CASE [1]

A. Procedural Background

This is a private antitrust action brought against Respondent Rose Acre by seven of its competitors (Petitioners A.A. Poultry Farms, Inc., et al.) for alleged "predatory price discrimination" in violation of Clayton Act 2(a), as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982) ("the Robinson-Patman Act"). Rose Acre filed an amended counterclaim in the District Court alleging that Petitioners were engaged in an illegal conspiracy to stabilize prices, and that this lawsuit is a "sham" brought pursuant to the conspiracy in an attempt to force Rose Acre to abandon its legitimate price competition with Petitioners. The District Court bifurcated Rose Acre's amended counterclaim for a separate trial, and Petitioners' claims against Rose Acre were tried to a jury in October, 1987. *See* App. B-6 & B-49-

[1] Petitioners' Statement of the Case is improperly argumentative in the extreme. It is essentially a diatribe—and an inaccurate diatribe at that. Throughout their Statement of the Case, Petitioners distort the record, mischaracterize the opinion below, make "factual" assertions that are not supported by any competent evidence, and ignore the undisputed facts relied upon by the courts below. Accordingly, Rose Acre has undertaken here to provide the Court with an accurate Statement of the Case.

50. The jury returned a verdict for Petitioners in the amount of $9,285,634—or approximately $27.9 million after trebling, an amount that (as the Court of Appeals noted) exceeds Rose Acre's net worth. App. A-2 & A-17.

The District Court granted Rose Acre's motion for judgment notwithstanding the verdict ("JNOV") and entered judgment for Rose Acre on Petitioners' claims. App. B-1-56.[2] The Court of Appeals unanimously affirmed the District Court's judgment. App. A-1-25. Petitioners did not seek rehearing or rehearing en banc in the Court of Appeals.

B. Factual Background

Respondent Rose Acre is an egg producer and processor located near Seymour, Indiana. Rose Acre is owned by the members of the Rust family (David Rust, Lois Rust and their seven children). As an integrated producer-processor, Rose Acre maintains its own flocks of egg-laying hens (called "layers") that *produce* the eggs, which Rose Acre then *processes* at the same location for sale to its customers. App. B-11. Rose Acre's production and processing facilities are highly automated. As the Court of Appeals aptly observed: "Rose Acre's chickens practically lay their eggs on conveyer belts, which carry them away to be graded, sorted by size, and crated in a continuous operation . . . in cartons suitable for supermarket shelves . . . ." App. A-2.

Petitioners are egg processors located in Ohio and Iowa who sell eggs in competition with Rose Acre and other egg processors in various states. App. B-8-9. Unlike Rose Acre, Petitioners do not produce their own eggs. Instead, Petitioners buy their eggs from independent producers and, after processing, resell those same eggs to grocery wholesalers and retailers, or to "market facilita-

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[2] The District Court also conditionally granted Rose Acre's alternative motion for a new trial and denied Petitioners' motion for summary judgment on Rose Acre's amended counterclaim. App. B-3-4 & B-56-77. Rose Acre's amended counterclaim remains pending in the District Court.

tors" such as "breakers" (businesses that "break" the eggs for use in finished products). App. B-9-10 & n.2; *see also* App. A-2.

It is undisputed that integrated producer-processors such as Rose Acre enjoy benefits of efficiency from producing and processing eggs at a single location that are not available to nonintegrated processors such as Petitioners who buy their eggs elsewhere. App. B-11. To achieve this efficiency, Rose Acre invested $13 million to build and install new, highly automated facilities in the late 1970s and early 1980s. *See* App. A-3 & A-15; App. B-14-15. As a result, Rose Acre increased its production capacity during this period by about 127%, from less than 1.5 million layers to approximately 3.4 million layers, and increased its gross revenues from $15.6 million per year to $42.5 million per year. App. B-15; App. A-3. Nevertheless, Rose Acre's sales during the relevant period (mid-1977 to mid-1983) represented only about 1% of national egg production, and never more than 8% to 9% of egg sales in the four-state area (Ohio, Indiana, Illinois and Michigan) where Rose Acre sold most of its eggs. App. B-27; App. A-3.

During this same period, other integrated producer-processors in the midwest also grew substantially or entered the market for the first time with large integrated facilities, including companies such as Wabash Valley Produce (growing from 2 million to 3.3 million layers), Midwest Poultry Services (growing from under 1 million to 2.25 million layers), Croton Egg Farm (new entrant with 2.8 million layers) and Daylay Egg Farm (new entrant with 1.2 million layers). App. B-25-26 (quoted at App. A-5). In total, 34 different companies with 1 million or more layers each entered the U.S. egg market or grew to become major competitors between 1977 and 1983, and while not all were successful, the average growth of these companies was approximately 220% during this period. App. B-25.

As a group, Petitioners themselves also experienced significant growth in sales during this period, increas-

ing their combined gross revenues from $60 million in 1977 to over $92 million in 1983. App. B-24. In fact, as the District Court pointed out, "[d]uring the relevant period, five of the seven [Petitioners] also experienced increased sales," App. B-15, and one Petitioner "grew almost as fast as Rose Acre did during the relevant period . . . ." App. B-25.

Prior to expanding its production in the late 1970s, Rose Acre sold most of its eggs within 100 miles of Indianapolis, Indiana. App. A-3. However, as Rose Acre began producing more eggs, Rose Acre began competing with Petitioners and others for sales in Illinois, Michigan, Ohio and New York. App. A-3-4; App. B-8-9 & B-15. In particular, Rose Acre was successful in selling its eggs to ten large supermarket chains that previously bought their eggs from one of the Petitioners. App. A-3. As the Court of Appeals succinctly stated: "To do this [Rose Acre] offered low prices." *Ibid.*

Egg prices are based on supply and demand, and vary from day to day as supply and demand shift. App. B-11 & B-13. Demand for eggs is subject to seasonal variations, and supply depends on how many eggs the hens happen to lay and what grades and sizes those eggs happen to be, with each combination of grade and size having an individual supply and demand. App. B-11-12. Because producers cannot control what grades and sizes the hens produce, App. B-12, and the "[h]ens do not always cooperate by laying eggs in the grades and sizes consumers want at the moment," App. A-2, all egg producers routinely experience surpluses or shortages of particular grades and sizes of eggs.[3] Moreover, eggs are a perishable commodity with a short shelf life, and the age of the eggs affects their marketability and the prices customers will pay. *See* App. B-12 & B-48. Thus, when surpluses occur, the surplus eggs must be disposed of quickly before they become too old to sell, and to make

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[3] Altman Cr., VII Tr. 152; Peter Dep., P.Ex. 102 at 27-28; Hemmelgarn Cr., VI Tr. 77-78; D. Rust Cr., IX Tr. 65; M. Rust Dir., Supp. 7 Tr. 30-32.

room for new eggs that the hens (oblivious to market surpluses) continue to lay every day. *See* App. B-48-49. Because of these market conditions, all egg companies are sometimes forced to sell at a loss.[4] As the Court of Appeals observed: " 'sell 'em or smell 'em' is the industry motto." App. A-2.

Petitioners prefer to sell their surplus eggs in the secondary market to "breakers" rather than selling at discount prices to their regular grocery store customers. App. A-2; App. B-49. Petitioners choose this alternative even though "breakers represent the least attractive alternative to the processors as their price is customarily lower." App. B-10 n.2. One Petitioner admitted that the purpose of selling surplus eggs to breakers was to keep egg prices higher in the grocery stores. Gressel Cr., II Tr. 79-81. Another Petitioner similarly opined that it is not "[g]ood business ethics" to "disrupt the marketplace with special prices." Peter Dep., P.Ex. 102 at 29.

Rose Acre, in contrast, sold significant quantities of surplus eggs as "specials" at discount prices to its regular retail and wholesale customers. App. A-2; App. B-16-18. Petitioners objected to Rose Acre's specials, and one of them went so far as to ask Rose Acre to stop selling specials in the regular market.[5] When Rose Acre refused, this lawsuit followed.

Petitioners have alleged that Rose Acre "offered selective discriminatory prices to a few large, targeted customers." Petition 7. However, the Court of Appeals stated that "[t]he only *evidence* we could find on the subject suggested that at any given moment Rose Acre was offering the same terms to anyone who then signed on as a customer." App. A-21 (emphasis added). Petitioners have also alleged Rose Acre's prices were "below *any* conceivable cost standard . . . ." Petition 8 (emphasis

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[4] Hemmelgarn Cr., VI Tr. 88; D. Rust Dep., P.Ex. 92 at 373; Gressel Cr., II Tr. 128-29; Altman Cr., VII Tr. 152.

[5] Gressel Cr., II Tr. 52-55; *see also* Hemmelgarn Cr., VI Tr. 77-78; Boomsma Cr., VII Tr. 111-12; Altman Cr., VII Tr. 162-64.

in original). The District Court, however, found that Petitioners' "evidence" on this subject was "speculative and unreliable," App. B-40, and that "[t]he data and analysis used by [Petitioners'] experts is *inadequate* to establish that Rose Acre's pricing practices were below its costs under the appropriate cost standard." App. B-38 (emphasis added).[6]

C. The District Court Opinion

The District Court entered JNOV for Rose Acre on two separate grounds. App. B-18-49. First, the District Court held that even *assuming* Rose Acre had discriminated in price between different purchasers of commodities of like grade and quality, the evidence was insufficient to support a finding that "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a) (1982). Second, the District Court held that Rose Acre's sales of surplus "specials" were exempt from the Robinson-Patman Act under the Fourth Proviso relating to "perishable goods." *Ibid.*[7]

Regarding the first ground for JNOV, the District Court held that: "In order to find liability for illegal price discrimination . . . [Petitioners] must show that

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[6] The Court of Appeals did not address this issue, but neither did it disturb the District Court's determination that Petitioners failed to prove below-cost pricing. *See* App. A, *passim.*

[7] Rose Acre also moved for JNOV on the ground that Petitioners "produced no probative evidence that Rose Acre engaged in price discrimination within the meaning of 15 U.S.C. § 13(a)." Rec. Doc. 183 at 1. The District Court did not address this question, but in granting JNOV for Rose Acre on other grounds merely *assumed* for purposes of its decision that Rose Acre had discriminated in price. *See* App. B-23. Petitioners blatantly misrepresent the record when they state: "There was no question before the trial judge or jury in the district court that Rose Acre had committed price discrimination." Petition 24 n.20. Besides being raised in Rose Acre's motion for JNOV, this deficiency in Petitioners' case was also raised in Rose Acre's trial brief (Rec. Doc. 170), motion for directed verdict (Rec. Doc. 171), and closing argument at trial (XII Tr. 46), as well as in Rose Acre's brief on appeal.

a competitive injury resulted from any differences in price." App. B-22. The District Court stated that Petitioners could establish competitive injury "by either showing: '1) actual competitive injury shown by market analysis; [or] 2) predatory intent from which competitive injury may be inferred.'" *Ibid.* (brackets in original; quoting *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982)).

On the subject of actual injury to competition, the District Court found that: "The evidence presented at the trial of this cause is not sufficient to find actual competitive injury in the egg market." App. B-23. To the contrary, the District Court held (at App. B-26-30) that:

> Even the most favorable viewing of the evidence in favor of the [Petitioners] indicates a healthy, competitive market, marked by the growth of the [Petitioners] and the entry and growth of other egg processors in the area. The contention that Rose Acre's expansion and growth harmed competition during this period is untenable. The evidence is insufficient to support any such contention.
>
> Nor was there any evidence of the trend toward monopolization of the market by Rose Acre. . . .
>
> Never in the short run or long run did Rose Acre ever dominate the egg market. Nor was there a time when Rose Acre could increase its prices to benefit from alleged predatory pricing. Rose Acre made a profit every year except one during the years in question which belies the charge of selling eggs before [sic] cost.
>
> . . . Given the economic realities of the egg industry, particularly the ½ cent to 1 cent per dozen eggs profit margin available to processors, it would have been impossible for Rose Acre to effectively control prices in the market. Had Rose Acre attempted to raise its prices at any time during that period to effectively use its 'monopoly power,' any number of processors would have sold under the inflated price to sell eggs in line with the market.

The District Court held that Petitioners could still prevail, however, "if there is sufficient evidence of Rose Acre's predatory intent from which competitive harm may then be inferred." App. B-30. The court said that such "predatory intent may be proven by showing either express evidence of predatory intent or the inference of predatory intent by showing pricing below cost." App. B-30-31 (citing *O. Hommel*, 659 F.2d at 347).

The District Court specifically analyzed Petitioners' purported evidence of express predatory intent, App. B-31-33, and held that the evidence was insufficient to establish predatory intent because it merely indicated "that Rose Acre intended to compete aggressively . . . ." App. B-32. The District Court held that Petitioners also "failed to produce sufficient evidence to support a finding that Rose Acre priced below cost." App. B-38.[8] Therefore, the District Court concluded that: "Because the evidence presented at trial is insufficient to establish that a competitive injury resulted from any difference in price charged by Rose Acre, the verdict for [Petitioners] cannot stand." App. B-46.

Alternatively, the District Court held that judgment for Rose Acre "is also warranted under the 'perishability defense' contained in the [Fourth Proviso of the] Robinson-Patman Act . . . ." App. B-47. The District Court based this alternative holding on uncontradicted evidence which established that "[t]he eggs produced by

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[8] Petitioners argued in the District Court that the relevant cost standard should be the long-run incremental cost ("LRIC") to Rose Acre of producing the additional or surplus eggs created by Rose Acre's expansion. App. B-33-38 & n.6. Based on a detailed analysis of the expert testimony offered by Petitioners, the District Court held that: "The data and analysis used by [Petitioners'] experts is inadequate to establish that Rose Acre's pricing practices were below its costs under the appropriate cost standard [LRIC]." App. B-38; *see also* App. B-38-45 (finding Petitioners' expert's testimony on this subject "speculative and unreliable" and "completely useless"). Accordingly, the District Court held that: "The jury could not properly infer from this evidence that Rose Acre sold eggs below its long-run incremental costs." App. B-45.

Rose Acre had to be distributed under the compulsion of perishability." App. B-49. Thus, the District Court held that: "Rose Acre's sales of eggs to retailers and wholesalers at special prices during the relevant period rather than to market facilitators [are] protected by the Fourth Proviso of the Robinson-Patman Act." *Ibid.*

D. The Court Of Appeals Opinion

The Seventh Circuit Court of Appeals unanimously affirmed the District Court's judgment for Rose Acre. Although acknowledging that Petitioners' claims were brought solely under the Robinson-Patman Act, the Court of Appeals first analyzed Petitioners' claims under a Sherman Act § 2 (15 U.S.C. § 2) attempted monopolization standard. App. A-2 & A-6-15. In performing this analysis, the court identified three approaches that have been used in attempting to distinguish legitimate competitive pricing from predatory pricing violative of the Sherman Act: (1) determining "whether the defendant's prices exceed its costs"; (2) "concentrat[ing] on the defendant's intent"; and (3) "look[ing] at the back end, the 'high price later' part of the predatory sequence." App. A-7-9. As among these three approaches, the Court of Appeals indicated (at App. A-9-10) that:

> Contemporary cases strongly favor using this third approach whenever possible. The two most recent predatory pricing cases in the Supreme Court, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), employ it, each holding that recoupment would be so unlikely that antitrust inquiry could not be justified. So too with our own most recent decision on point, *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989).

Applying the principles enunciated in *Matsushita* and *Cargill* to the facts presented here, the Court of Appeals concluded that Rose Acre could not have been liable under Sherman Act § 2, stating that:

> Our review of the record leads us to agree with the district court that no rational jury could have found that recoupment took place, could have taken place, or conceivably could take place in the future. To the contrary, the overwhelming impression left by this record is that Rose Acre beat its rivals to the punch in automating production and used its lower costs to take business away from them. New entrants with modern technology have flourished; stodgy firms have stagnated. This is what competition is all about, and to penalize it in the name of antitrust would do a great disservice to consumers.

App. A-15.[9]

Nevertheless, the Court of Appeals stated that: "To conclude that Rose Acre did not engage in predatory pricing is not necessarily to absolve it under the Robinson-Patman Act." App. A-15. The Court of Appeals observed that in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), this Court "held that the firm taking the lead in reducing prices may be liable [under the

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[9] Regarding the other methods for determining predation, the Court of Appeals stated that: "Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost." App. A-10. In addition, the court said that: "Making likelihood of recoupment the initial hurdle avoids not only questions of cost but also questions of intent, for if a price below cost is lawful when it cannot lead to monopoly, then the defendant's state of mind becomes irrelevant." *Ibid.* Moreover, the Court of Appeals found (as had the District Court) that the specific "evidence" of alleged predatory intent cited by Petitioners did not establish predatory intent at all, but merely showed that Rose Acre was acting as a vigorous competitor. App. A-11-12. Furthermore, following *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), the Court of Appeals stated that because "[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition . . . [and] also complicates litigation . . . , we now hold that intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act." App. A-12-13 (disagreeing with *McGahee v. No. Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989), and "occasional, similar, decisions elsewhere").

Robinson-Patman Act] on account of a 'drastically declining price structure' in a 'highly competitive' market." App. A-19 (quoting *Utah Pie*, 386 U.S. at 703). Thus, despite the fact that " 'ordinary' antitrust standards suggest giving Rose Acre a medal rather than requiring it to pay $28 million in damages," the Court of Appeals concluded that "Robinson-Patman cases, for now at least, follow the approach of *Utah Pie*." App. A-17-18.[10]

However, the Court of Appeals found it unnecessary to decide whether Petitioners had shown sufficient competitive harm under *Utah Pie* because the court held that Petitioners failed to meet their burden of proof on the first essential element of their case, namely, "price *discrimination*, as the Robinson-Patman Act uses that term." App. A-20 (emphasis in original). First, the Court of Appeals held that Petitioners erroneously confused *economic* price discrimination with *legal* price discrimination. The court said (at App. A-20) that:

> This puts a big hole in [Petitioners'] case, because [Petitioners' expert] Professor Mueller testified that Rose Acre engaged in three kinds of price discrimination, of which the first was charging the same price to customers in different cities. Economic price discrimination this undoubtedly was; legal price discrimination it just as surely was not. Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* 87-99 (1962).

Second, the Court of Appeals held that Petitioners' evidence was insufficient because it ignored the critical fact that Rose Acre's prices to different customers were set at different times. The court stated (at App. A-21):

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[10] Specifically, the Court of Appeals noted that *Utah Pie* "recited that 'predatory intent' coupled with 'unreasonably low prices' may be the basis of liability [under the Robinson-Patman Act], . . . so our conclusion that resort to intent under § 2 of the Sherman Act creates substantial prospect of injury to competition and needlessly complicates litigation does not support a judgment *in this court* taking intent outside the pale of Robinson-Patman litigation." App. A-19 (emphasis in original; citation omitted).

> Whether Rose Acre engaged in price discrimination as the Robinson-Patman Act uses that term depends on whether it charged the same price to customers at the same time. *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 806 (9th Cir. 1969). Prof. Mueller did not address that question. The only evidence we could find on the subject suggested that at any given moment Rose Acre was offering the same terms to anyone who then signed on as a customer.

Third, the Court of Appeals held that Petitioners failed to prove any difference in Rose Acre's mean prices to different customers after prices for specials were blended with prices for non-specials. The court explained (at App. A-22, emphasis in original) that:

> Whether price discrimination has occurred depends . . . on the price *after* all discounts, specials, and so on. *See Fruitvale Canning Co.*, 52 F.T.C. 1504, 1520 (1956); Julian O. von Kalinowski, *4 Antitrust Laws and Trade Regulation* § 27.03[2] (1988 ed.) (collecting sources).
>
> Asked at trial whether he had computed the mean price paid by customers after blending in the specials, Dr. Mueller said no. . . . Asked at oral argument whether it would be possible to whip up the blended price from the record, counsel for [Petitioners] said only that Rose Acre's pricing information was there—in carton upon carton full of forms. [Petitioners] did not try to use this information; the jury did not have it; we could not derive it without Herculean labors.

Fourth, the Court of Appeals held that Petitioners failed to present any evidence to carry their burden of proving that Rose Acre's specials were of "like grade and quality" compared to its other sales. App. A-22-23. The court said that Petitioners' expert "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract; he did not." App. A-23.

Thus, the Court of Appeals concluded that: "For all we can tell—for all the jury could have told—Rose Acre

offered uniform blended prices to customers at any particular time for like-quality goods. [Petitioners] failed to prove an essential element of their case, and the judgment is therefore AFFIRMED." App. A-23-24.

SUMMARY OF ARGUMENT

This is a highly complex, fact-intensive antitrust action in which both the District Court and the Court of Appeals, after reviewing the evidence in the light most favorable to Petitioners, unanimously held that Petitioners failed to present sufficient evidence to support their claims. The Petition in this case essentially asks this Court to conduct yet another de novo review of the evidence and to reverse the evidentiary assessments made by both courts below. In some instances, the fact-bound nature of the inquiry is evident from the Petition itself. Petitioners' Question 3, for example, not only asks this Court to review a routine sufficiency-of-the-evidence question, but to do so would require this Court to sift through box after box of business records in search of purported "evidence" of price discrimination that neither Petitioners nor their expert have ever identified and that, in reality, simply does not exist.

In other instances, Petitioners have attempted to disguise the fact-sensitive nature of the questions presented by misstating the record and mischaracterizing the opinion below. Petitioners' Questions 1(a)-(c) are prime examples. All three questions are premised on assertions of purported "fact" that are not supported by the record and, indeed, are contrary to evidentiary determinations made by the courts below. *See infra* at 18-21. Moreover, all three questions are based on a gross mischaracterization of the Court of Appeals' opinion in which Petitioners confuse the Court of Appeals' analysis of predatory pricing under Sherman Act § 2 with the Court of Appeals' separate discussion of the Robinson-Patman Act.

Petitioners' Question 2 (relating to the "perishable goods" exemption in the Robinson-Patman Act) is even farther afield. Here Petitioners have asked this Court

to review a uniquely fact-sensitive issue that was not addressed by the Court of Appeals, and that was relied upon by the District Court only as an alternative ground for its decision.

In sum, the Petition does not present any issue worthy of this Court's consideration or even remotely suitable for this Court's certiorari jurisdiction. Resolution of the questions presented by this Petition would require this Court to conduct a de novo review of the extensive record in this case in order to determine a whole series of sufficiency-of-the-evidence questions, including: (1) whether Petitioners presented sufficient evidence of price discrimination; (2) whether the evidence is sufficient to support Petitioners' contention that the egg market is an "oligopoly"; (3) whether Petitioners presented sufficient evidence that Rose Acre's prices were below long-run incremental cost; (4) whether Petitioners presented any probative evidence of subjective predatory intent; and (5) whether the evidence establishes that Rose Acre's specials were distributed under the compulsion of perishability. The District Court and the Court of Appeals have both reviewed this evidence in the light most favorable to Petitioners, and both courts have held that the evidence is insufficient to support a verdict in Petitioners' favor.

The decisions below are based on sound reasoning and, though resting on different grounds, arrive at the same definitive conclusion: that Rose Acre did not violate the antitrust laws by selling its eggs at competitive prices, and that "to penalize [Rose Acre] in the name of antitrust would do a great disservice to consumers." App. A-15; *see also* App. B *passim*. In a largely transparent effort to create the illusion of injustice below, Petitioners have misstated the facts, mischaracterized the opinion below and, as a final act of desperation, launched an unjustified personal attack on the author of the Court of Appeals' opinion (Judge Easterbrook). This is hardly the stuff of which a Supreme Court case is made.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' QUESTIONS 1(a)-(c) ARE BASED ON A MISCHARACTERIZATION OF THE COURT OF APPEALS' OPINION AND ON ASSERTIONS OF PURPORTED "FACT" THAT ARE NOT SUPPORTED BY THE RECORD. IN ANY EVENT, THESE QUESTIONS DO NOT PRESENT ANY ISSUE MERITING REVIEW BY THIS COURT.

A. Petitioners' Questions 1(a)-(c) Are Based On An Inaccurate Portrayal Of The Decision Below.

The first reason why certiorari should not be granted to review Petitioners' Questions 1(a)-(c) is that these questions do not belong in this case. All three questions are based on an inaccurate portrayal of the Court of Appeals' decision. Specifically, Petitioners have premised their questions on the misguided contention that the Court of Appeals adopted "monopolistic recoupment" as the "exclusive" basis for evaluating harm to competition under *both* Sherman Act § 2 and the Robinson-Patman Act. From this erroneous premise Petitioners argue that the Court of Appeals "abolish[ed] both predatory intent and pricing below cost as means to establish harm to competition," Petition 10, and that "such a construction nullifies the Robinson-Patman Act." *Id.* 12. The Court of Appeals did nothing of the sort.

First of all, the Court of Appeals did *not* adopt "monopolistic recoupment" as the *sole* basis for evaluating predatory pricing cases under either the Sherman Act or the Robinson-Patman Act. Rather, the Court of Appeals merely recognized that, in evaluating predatory pricing claims *under Sherman Act § 2*, the economic plausibility approach employed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 nn.15-17 (1986), should be used as a "filter" to identify those cases where successful predation is "so unlikely that antitrust inquiry could not be justified." App. A-9-10. In doing so, the Court of

Appeals did *not* reject all cost-based tests, as Petitioners spuriously contend. On the contrary, the Court of Appeals expressly recognized that one way to detect possible predation "is to find out whether the defendant's prices exceed its costs." App. A-7. The Court of Appeals concluded, however, that market structure should be examined first, because "[o]nly if market structure makes recoupment feasible need a court inquire into the relation between price and cost." App. A-10. As discussed below, this threshold examination of market structure is fully consistent with this Court's decisions in *Matsushita* and *Cargill*. *See infra* at 22-23. It is also fully consistent with decisions in every circuit that thus far has had occasion to apply the *Matsushita* economic plausibility test.[11]

Nor is there any basis for Petitioners' contention that the Court of Appeals imposed any kind of "monopolistic

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[11] *See Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1255-56 (5th Cir.) (holding that "[w]ithout an economically plausible theory of anticompetitive effect, Stitt was not entitled to reach the jury on the predatory-pricing claim," and affirming a directed verdict for defendant where the evidence did not support an "economically plausible inference" that defendant could ultimately raise prices above competitive levels), *cert. denied*, 109 S. Ct. 224 (1988); *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 599-600 (8th Cir. 1987) (affirming summary judgment for defendant GF where market circumstances "strongly suggest that predatory pricing by GF would not be rational economic behavior"), *cert. denied*, 484 U.S. 1010 (1988); *Morristown Block and Concrete Prod. Co. v. General Shale Prod. Co.*, 829 F.2d 39 (6th Cir. 1987) (unpublished opinion), *aff'g per curiam*, 660 F. Supp. 429, 432 (E.D. Tenn. 1986) (summary judgment granted for defendant where "it does not make economic sense in this case for [defendant] to engage in predatory pricing"); *also Metro Mobile CTS, Inc. v. New Vector Communications, Inc.*, 892 F.2d 62, 1989-2 Trade Cas. (CCH) ¶ 68,878 at 62,629 (9th Cir., Dec. 20, 1989) (affirming summary judgment for defendant and citing *Matsushita* for the proposition that "[b]ecause the barriers to entry were concededly low, it was virtually impossible for [defendant] to exercise control over price for an extended time"); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415-16 (7th Cir. 1989) (cited at App. A-10).

recoupment" requirement *under the Robinson-Patman Act*. The Court of Appeals' discussion of "monopolistic recoupment" is confined to the court's analysis under Sherman Act § 2. Likewise, the Court of Appeals' conclusion that evidence of subjective intent "does not help to separate competition *from attempted monopolization*," App. A-12 (emphasis added), is expressly limited to the Sherman Act. App. A-13 (stating that "intent is not a basis of liability . . . in a predatory pricing case *under the Sherman Act*") (emphasis added). As for the Robinson-Patman Act, the Court of Appeals acknowledged that *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), "took a different view of things." App. A-16. Accordingly, the Court of Appeals held that in Robinson-Patman cases, as opposed to Sherman Act cases, " 'predatory intent' coupled with 'unreasonably low prices' may be the basis of liability." App. A-19 (quoting *Utah Pie*, 386 U.S. at 696 n.12).[12]

Thus, an accurate reading of the Court of Appeals' decision dissolves at least three of Petitioners' arguments at the outset. First, it exposes as frivolous Petitioners' contention that the Seventh Circuit has done away with all cost-based tests for predatory pricing cases, and at the same time refutes Petitioners' attempt to portray the decision below as somehow inconsistent with cases from other circuits.[13] Second, it reveals that there is absolutely

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[12] The question of whether *Utah Pie* is still good law is *not* presented by this Petition. In fact, to the extent this question was resolved below, it was decided in Petitioners' favor and, therefore, cannot reasonably be raised by Petitioners as a basis for certiorari. Furthermore, because the Court of Appeals rested its judgment on an entirely separate ground (*i.e.*, Petitioners' failure to prove price discrimination), the Court of Appeals' discussion of *Utah Pie*—indeed, its entire discussion of harm to competition under the Robinson-Patman Act—is purely dictum. *See infra* at 21.

[13] As for the Fifth, Sixth, Eighth and Ninth Circuits, *see supra* note 11. Nor is the Seventh Circuit's opinion in this case in conflict with the cases cited as Petition 15-16 n.11. All but six of those cases were decided prior to this Court's 1986 decision in *Matsushita*, which laid the groundwork for the economic plausibility test. In

no basis for Petitioners' contention that the Seventh Circuit disregarded *Utah Pie*; on the contrary, the court took the view of *Utah Pie* most favorable to Petitioners. And third, it evaporates Petitioners' disingenuous contention that the Seventh Circuit has somehow "nullified" the Robinson-Patman Act.

B. Petitioners' Questions 1(a)-(c) Are Based On Assertions Of Purported "Fact" That Are Not Supported By The Record, And That Would Require This Court To Engage In An Extensive De Novo Review Of The Voluminous Record In This Case.

Petitioners' Questions 1(a)-(c) suffer from another, equally fatal defect. All three questions are based on "factual" assertions that are not supported by the record.

Question 1(a), for example, is based on the unsupported factual premise that the egg market is an "oligo-

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five of the six post-*Matsushita* cases, the courts expressly recognized that in addition to below-cost pricing, the alleged predator must also have the capability to succeed in a predatory pricing scheme by recouping its losses through higher prices later. *See C.A.T. Indus. Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 884 F.2d 209, 211 (5th Cir. 1989) (per curiam) (recognizing that "inherent in a predatory pricing scheme is the predator's need to recoup losses through subsequent higher prices," and affirming summary judgment for the defendant where "it is unlikely that [defendant] would be able to control prices for any meaningful period, because other competitors easily can enter the market"); *Clamp-All Corp. v. Cast Iron Soil Pipe Instit.*, 851 F.2d 478, 483 (1st Cir. 1988) (citing *Matsushita*), *cert. denied*, 109 S. Ct. 789 (1989); *McGahee v. No. Propane Gas Co.*, 858 F.2d 1487, 1501-02 (11th Cir. 1988) (discussing *Matsushita* and *Cargill*), *cert. denied*, 109 S. Ct. 2110 (1989); *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344-46 (8th Cir. 1987) (discussing *Matsushita*); *Instructional Systems Dev. Corp. v. Aetna Cas. and Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987) (recognizing that defendant must be able through "short term price cutting to secure long term monopoly profits"). In the sixth case, *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989), there was no allegation of below-cost pricing and thus no need to decide whether predation was plausible.

poly." *See* Petition i & 10-13. This startling contention is not only contrary to the uncontested evidence in this case, it is patently absurd. There are literally hundreds of egg processors in the United States and, according to the most recent statistics in the record, more than 150 egg processors in Indiana, Ohio, Illinois and Michigan alone. *See* P.Ex. 52-14ee. Moreover, during the period relevant to this action, the number of major producer-processors (those with one million or more layers) actually *increased* from 34 in 1977 to 56 in 1983. *See* P.Exs. 32-36. As Petitioners note: "'An oligopoly market is one in which a few relatively large sellers account for all or the bulk of the output." Petition 11 n.5 (quoting II P. Areeda & D. Turner, *Antitrust Law* ¶ 404 at 272 (1978)). Petitioners do not define what they mean by "a few." But whatever it means, a market with hundreds of sellers plainly cannot be it.[14]

Likewise, Petitioners' Question 1(b) is premised on the unsupported factual contention that Rose Acre acted with "predatory intent." Here, Petitioners conveniently ignore the fact that both the District Court and the Court of Appeals found Petitioners' evidence *insufficient* to support a finding of predatory intent. App. B-31-33; App. A-11-12. Both courts below ruled that the evidence merely established that Rose Acre was acting as a legitimate competitor, and simply "beat its rivals to the punch in automating production" and used its lower costs to offer more competitive prices. App. A-15.

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[14] Petitioners' attempt to portray the egg market as an oligopoly is also flatly refuted by the District Court's finding that: "Even the most favorable viewing of the evidence in favor of [Petitioners] indicates a healthy, competitive market . . . ." App. B-26. Petitioners' contention is further refuted by the undisputed fact that prices in the egg market vary from day to day based on supply and demand. In contrast, "[t]he characteristic feature of oligopoly is price rigidity. Changes in published prices are made relatively infrequently, and then only in response to relatively substantial or prolonged changes in demand or costs." II P. Areeda & D. Turner, *supra* ¶ 404b3 at 276-77.

Similarly, Petitioners' Question 1(c) is based on the mythical contention that the record contains "extensive proof of below-cost pricing," Petition 17, and that this purported evidence "would have prevailed under *any* cost-price measure . . . ." *Id.* 18 (emphasis in original). Once again, the District Court held otherwise. The District Court held that Petitioners' evidence on below-cost pricing was "speculative and unreliable," App. B-40, and therefore was *insufficient* to support Petitioners' contention that Rose Acre priced its eggs below cost. App. B-38-47.[15] The Court of Appeals did not disturb the District Court's holding on this point.

Thus, despite Petitioners' effort to cast their Questions 1(a)-(c) as if they were questions of law, this is simply not the case. Inherent in each question is a factual premise that is not supported by the record. Moreover, to review these questions this Court would necessarily become embroiled in an extensive de novo review of the voluminous record in this case to determine whether there is sufficient evidence to support Petitioners' contentions. This is not the type of question suitable for this Court's certiorari jurisdiction, nor is it worthy of this Court's time and attention, especially since two courts below already have reviewed Petitioners' evidence and found it to be insufficient. *See, e.g., Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924) (writ dismissed where original certiorari papers failed to

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[15] The "evidence" of alleged below-cost pricing cited in the Petition is the same "evidence" the District Court found insufficient to show that Rose Acre priced its eggs below long-run incremental cost (LRIC). Even though Petitioners argued in the District Court in favor of LRIC as the appropriate cost standard, Petitioners now claim (somewhat belatedly) that Rose Acre also priced its eggs below average variable cost ("AVC"). Petition 8 & 17-18. This is a specious contention. First of all, Petitioners' purported "evidence" of below-AVC pricing is as deficient as their purported "evidence" of below-LRIC pricing. Second, since AVC is a *lower* measure of cost than LRIC, the District Court's determination that Petitioners failed to prove pricing below LRIC necessarily means that Petitioners also failed to prove pricing below AVC.

disclose underlying sufficiency-of-the-evidence questions). This Court has frequently cautioned that: "We do not grant a [writ of] certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *accord NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari). Yet, that is exactly what Petitioners' Questions 1(a)-(c) would require this Court to do.

C. Petitioners' Questions 1(a)-(c) Do Not Present Any Issue Meriting Review.

In any event, no matter how the questions are framed, and no matter what they assume, Petitioners' Questions 1(a)-(c) do not raise any issue meriting review by this Court. To begin with, these questions have nothing to do with the basis for the Court of Appeals' *judgment* in this case. Although the Court of Appeals' *opinion* discusses predatory pricing under the Sherman Act and harm to competition under the Robinson-Patman Act at some length, App. A-6-19, the Court of Appeals' *judgment* squarely rests on only one, entirely unrelated ground: the absence of any evidence to prove price discrimination. App. A-20-24. Everything else "is plainly dictum, presenting nothing reviewable by this Court." *Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J., on application for stay); *see also Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions"); *accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).[16]

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[16] This is especially true of the Court of Appeals' discussion of the Sherman Act (App. A-7-15) inasmuch as no Sherman Act claim has ever been made in this action and none is being made now. Petitioners' claims in the District Court (App. B-5-6), in the Court of Appeals (App. A-2), and in this Court are based solely on the Robinson-Patman Act. *See* Petition 2-3, 6 & 8. Indeed, the Robinson-Patman Act is the only statute cited by Petitioners as a "Statutory Provision Involved" in this Petition. *Id.* 2-3.

This alone is a sufficient basis for declining review of Petitioners' Questions 1(a)-(c). But even if one were to overlook this basic tenet of Supreme Court jurisprudence, there is still nothing presented here that merits this Court's attention. Most of Petitioners' arguments on this subject are devoted to lambasting the Court of Appeals' use of an economic plausibility test (what Petitioners call a "monopolistic recoupment" test) in analyzing Petitioners' predatory pricing allegations under a Sherman Act § 2 standard.[17] From reading the Petition, one would think that this approach was invented by the Seventh Circuit and applied for the first time in recorded history in this case. That is far from accurate. In fact, the approach taken by the Court of Appeals in this case is merely an application to these specific facts of the principles set out by this Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119-21 nn. 15-17 (1986).

In *Matsushita*, this Court recognized that predatory pricing schemes are "inherently uncertain" and for that reason "are rarely tried, and even more rarely successful." *Matsushita*, 475 U.S. at 589; *accord Cargill*, 479 U.S. at 121 n.17. "Moreover, the mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Cargill*, 479 U.S. at 121 n.17 (citing *Matsushita*, 475 U.S. at 594). "Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Accordingly, this Court held in *Matsushita* and reaffirmed in *Cargill* that predatory pricing could not be inferred where "economic realities" are such that there could be

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[17] As previously discussed, Petitioners erroneously assert that the Court of Appeals also applied a "monopolistic recoupment" standard under the Robinson-Patman Act. This is simply a mischaracterization of the Court of Appeals' opinion. *See supra* at 16-17.

no "reasonable expectation" of succeeding in a predatory pricing scheme. *Matsushita*, 475 U.S. at 595 & 589; *accord Cargill*, 479 U.S. at 119 n.15 ("Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme").

Contrary to the impression Petitioners attempt to create, there is no "confusion" (let alone "total chaos") in the lower courts regarding either the meaning or effect of the *Matsushita* economic plausibility requirement. As the Eighth Circuit has succinctly stated: "In essence, *Matsushita* imports a rule of impossibility into predatory pricing cases: if the defendant could not have captured the market, its conduct cannot be predatory, no matter what its 'intent.'" *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345 (8th Cir. 1987). And that is exactly how *Matsushita* has been uniformly applied, both in the Seventh Circuit and in every other circuit in which the issue has arisen. (*See* cases cited *supra* note 11.)[18]

Petitioners also argue that this Court should grant review to resolve a disagreement between the First and Seventh Circuits, on the one hand, and the Eleventh Circuit, on the other hand, as to the relevance of subjective intent in a Sherman Act § 2 predatory pricing case. See App. A-13 (discussed *supra* note 9). Petitioners, however, do not make much of this issue, and for good reason. The resolution of this question is wholly irrelevant to the outcome of this case. No matter how the Court might rule on this question, the result remains the same: Rose Acre wins and Petitioners lose.

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[18] The only "confusion" in the lower courts relates to an entirely different question, and one that is *not* presented here: the question of what measure of cost should be used in applying a cost-based test for predatory pricing claims. *See Matsushita*, 475 U.S. at 585 n.8 (referring to the "debate" on this question, but finding it unnecessary to resolve the debate). Petitioners acknowledge that this question is not presented by this case, Petition 17 & n.14, and Rose Acre agrees (albeit for different reasons).

First, as previously indicated, the Seventh Circuit's comment that it agrees with *Barry Wright*, and thus disagrees with *McGahee* (see *supra* note 9), is limited to claims under Sherman Act § 2—a claim that Petitioners did not pursue in the District Court and are not pursuing in this Court either. *See supra* at 21 & note 16. Thus, this issue is not even raised on the record in this case. Second, the District Court and the Court of Appeals both found in any event that Petitioners failed to present sufficient evidence to support a finding of predatory intent. *See supra* at 8, 10 n.9 & 19. Third, the question of subjective intent is rendered irrelevant in this case by the District Court's and the Seventh Circuit's concurrent findings that Rose Acre could not possibly have succeeded in raising egg prices through a predatory pricing scheme. *See supra* at 7 & 10. Therefore, under *Matsushita* and *Cargill*, Petitioners' predatory pricing claim must be rejected as economically implausible regardless of Rose Acre's "intent." *See, e.g., Henry*, 809 F.2d at 1345 (if defendant could not have captured the market, defendant's intent is irrelevant); App. A-10 ("Making likelihood of recoupment the initial hurdle avoids . . . questions of intent"). And fourth, no court—not even the Eleventh Circuit in *McGahee*—has held that liability for predatory pricing can be based *solely* on evidence of subjective predatory intent. The plaintiff still has to prove that the defendant's prices were below the appropriate measure of cost. *See McGahee*, 858 F.2d at 1503. In this case Petitioners failed to present sufficient evidence to support a finding that Rose Acre priced its eggs below the cost measure (LRIC) Petitioners themselves advocated as the appropriate standard. *See supra* at 8 & note 8.

Thus, in the context of this case, the question of whether subjective intent evidence should be considered in a Sherman Act § 2 predatory pricing case is purely academic. "But this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955)

(Frankfurter, J., writing for the Court). As aptly stated in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), "this Court decides questions . . . in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the issue] . . . can await a day when the issue is posed less abstractly."

Furthermore, Petitioners have made absolutely no showing that this issue is of sufficient *importance* to justify review, or that the Eleventh Circuit's disagreement with the First and Seventh Circuits on this narrow, esoteric matter otherwise represents an "intolerable" conflict. *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* §§ 4.3 & 4.4 at 196 & 199-200 (6th ed. 1986). Because predatory pricing is such a rare occurrence to begin with, *see Matsushita*, 475 U.S. at 589, and because the vast majority of cases that do get litigated ultimately are decided on grounds unrelated to subjective intent (this case being a good example), it will be the rare case indeed in which the result is likely to be influenced one way or the other by what is essentially an evidentiary question that is bound to vary in application from case to case and from district judge to district judge anyway. Moreover, the number of cases in which courts are even called upon to address questions of intent will likely be reduced further as more courts apply the *Matsushita* economic plausibility test as a threshold mechanism for identifying those cases in which predation is plainly implausible. This Court "must necessarily confine itself to those [issues] which reflect the more important legal problems within the realm of its jurisdiction." R. Stern, E. Gressman & S. Shapiro, *supra* § 4.11 at 212. This is not one of those questions.

Finally, the Seventh Circuit's conclusion that statements of subjective intent are not a sound basis for imposing liability in predatory pricing cases under Sherman Act § 2 is absolutely correct. The line between

statements of legitimate competition and unlawful predation is not merely fuzzy, it is nonexistent. This view is supported both by the First Circuit's cogent reasoning in *Barry Wright*, 724 F.2d at 232, and by leading antitrust scholars.[19] This is precisely the type of question where additional thought and experience in the crucible of actual trials should prove beneficial and, ultimately, should cause any disagreement to disappear entirely.

II. PETITIONERS' QUESTION 2 SEEKS REVIEW OF A FACT-SPECIFIC QUESTION THAT WAS NOT ADDRESSED BY THE COURT OF APPEALS AND DID NOT FORM THE BASIS FOR THE COURT OF APPEALS' DECISION.

Petitioners' Question 2 is similar to Petitioners' Questions 1(a)-(c) in that here, too, Petitioners are seeking review of a fact-sensitive question based on the specific evidence presented in this case. Indeed, Petitioners' Question 2—"Whether Eggs And Other Grocery Commodities With A Limited Shelf Life Are Exempt From The Robinson-Patman Act" [20]—is inappropriate for review on yet another level since this issue was not discussed at all by the Court of Appeals and was cited by the District Court only as an alternative basis for its decision.

This Court has frequently stated that: "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981); *see also Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971). Given the intensely fact-bound nature of the issue (*i.e.*, whether the evidence presented at trial established that Rose Acre's specials had to be distributed under the compulsion of perishability), coupled with the fact that both the Court of Appeals' and the District Court's judgments soundly rest on addi-

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[19] *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 714.2c at 564 (1989 Supp.); J. von Kalinowski, *Antitrust Report* 7 (Sept. 1989).

[20] Petition 18 (heading II).

tional independent grounds, this would "be a poor case in which to depart from that practice." *J. Truett Payne*, 451 U.S. at 568.[21]

III. PETITIONERS' QUESTION 3 IS A ROUTINE SUFFICIENCY-OF-THE-EVIDENCE QUESTION HAVING NO IMPORTANCE TO ANYONE OTHER THAN THESE PARTIES.

Finally, Petitioners' Question 3 asks this Court to review the question of whether Petitioners presented sufficient evidence of price discrimination to support their Robinson-Patman Act claim. See App. A-20-24. This is the very model of a question whose "review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (vacating improvident grant of certiorari). The essence of Petitioners' Question 3 is stated in the last line of their argument, where Petitioners maintain that: "The Seventh Circuit's radical *disregard for the evidence* of record mandates review by this Court." Petition 24 (emphasis added). But as previously indicated, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *Johnston*, 268 U.S. at 227. "Nor does it

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[21] Petitioners vainly attempt to tie this issue into the Court of Appeals' decision by intermingling two analytically distinct matters: (1) the District Court's alternative holding based on the "perishable goods" exemption in the Fourth Proviso (App. B-47-49); and (2) the Court of Appeals' discussion of the "like grade and quality" requirement that is part of Petitioners' prima facie case under the Robinson-Patman Act (App. A-22-23). See Petition 18-22. These are two entirely separate issues. Nevertheless, Petitioners try to collapse them (or at least create the appearance of collapsing them) by repeatedly referring to the "decisions below" and the "opinions below" as if both opinions deal with the same issue when, in fact, they do not. *Id.* 19 & 20. Petitioners also try to tie the two questions together by arguing that the Court of Appeals' discussion of the "like grade and quality" requirement "reverses the statutory burden of proof" under the Robinson-Patman Act. *Id.* 18. Even though this is a case about eggs, Petitioners are mixing apples and oranges. The burden of proving "like grade and quality" belongs to the plaintiff; the burden of proving the perishability defense is the defendant's.

sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74.

Adherence to the Court's normal practice of declining to review questions of this nature is particularly appropriate in this case where, despite numerous opportunities, Petitioners *still* have not come forth with evidence of even a single instance of actionable price discrimination. Instead, Petitioners have continued to rely on vague references to unspecified "business records" and so-called "expert" testimony that, upon analysis, actually demonstrate nothing of any legal significance. *See* Petition 23. The Court of Appeals, quite correctly, was unwilling to shoulder Petitioners' burden of proof for them.

Petitioners do not—and in good faith cannot—question the *legal* principles relied upon by the Court of Appeals. The legal principles cited by the Seventh Circuit are hornbook law that have not changed for decades. *See* App. A-20-22 (and authorities cited there). The Seventh Circuit's opinion neither adds to nor varies these long-standing principles of law. It simply applies them to the specific evidence presented in this case.

Furthermore, there is absolutely no merit to Petitioners' strained efforts to portray the Court of Appeals' decision in this case as somehow "creating a *per se* exception" from the Robinson-Patman Act for perishable goods. Petition 19. The Court of Appeals merely stated that Rose Acre's specials "were *not necessarily* the same grade and quality as Rose Acre's other sales." App. A-22 (emphasis added). And because the Petitioners had the burden of proving under the Robinson-Patman Act that the eggs were "of like grade and quality," 15 U.S.C. § 13(a) (1982), the court held that Petitioners "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract." App. A-23. It was Petitioners' failure to present any evidence whatsoever on this element of their case—not any *per se* rule of law—that, among the many other

deficiencies in Petitioners' evidence, led to judgment in Rose Acre's favor.

Petitioners' failure to sustain their burden of proof in this case has nothing to do with the way Rose Acre kept its records (an excuse Petitioners tried to use in the Court of Appeals). It has everything to do with the fact that Rose Acre did nothing wrong. The alleged "evidence" of price discrimination cannot be constructed from Rose Acre's records because it is not there. Rose Acre did not engage in illegal price discrimination. Rose Acre engaged in legitimate price *competition*. This is precisely the type of competitive behavior "the antitrust laws are designed to protect." *Cargill*, 479 U.S. at 121 n.17 (quoting *Matsushita*, 475 U.S. at 594). As the Court of Appeals observed, Rose Acre deserves a medal, not a $28 million penalty. *See* App. A-17.

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Before closing, a few words should be said about Petitioners' unjustified personal attacks against Circuit Judge Easterbrook. See, e.g., Petition 5, 16 n.12 & 22. Apparently Petitioners have overlooked the fact that Judge Easterbrook did not act alone in this case; his opinion was joined by Chief Judge Bauer and Senior District Judge Grant, all of whom reached the same result arrived at by District Judge Noland. Nor is there any merit to Petitioners' contention that Judge Easterbrook imposed his own personal "agenda" upon this case. The principles of economic plausibility discussed in this case are precisely the same principles adopted by this Court in *Matsushita* and *Cargill*, and applied in similar fashion by courts within and without the Seventh Circuit. *See supra* at 22-23 & note 11.[22] Likewise, the absurd notion

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[22] In *Matsushita*, this Court cited and extensively quoted Judge (then-Professor) Easterbrook's writings as authority supporting the Court's decision. *See Matsushita*, 475 U.S. at 589, 591 n.15 & 595 (citing and quoting Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981), and Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 26-27 (1984)). Ironically, Petitioners now cite Judge Easterbrook's 1981 article as

that Judge Easterbrook was somehow acting to "repeal" the Robinson-Patman Act is belied by the Court of Appeals' approach to this Court's decision in *Utah Pie*. Petitioners' desperate resort to *ad hominem* attacks only confirms that there are no *issues* in this case worthy of review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

ROBERT KIRK STANLEY *
STEPHEN H. PAUL
JOHN R. SCHAIBLEY, III
BAKER & DANIELS
300 North Meridian Street
Suite 2700
Indianapolis, Indiana 46204
(317) 237-0300
Counsel for Respondent

* Counsel of Record

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"support" for their contention that Judge Easterbrook imposed his own private views on the law without mentioning that these same views were adopted by this Court in *Matsushita*.